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The Rehnquist Court and State Constitutional Law

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THE REHNQUIST COURT AND STATE CONSTITUTIONAL LAW*

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On September 26, 1986, William Rehnquist was sworn in as Chief Justice of the United States Supreme Court. At that time the renaissance in state constitutional law was at its peak and the Supreme Court had decided *Michigan v. Long*.[1] My task today is to discuss how the Rehnquist Court affected state constitutional law. As background, I shall discuss some general principles concerning state constitutional law prior to the *Long* decision. Then, I will examine the response of the Rehnquist Court and state courts to the plain-statement requirement of *Long*,[2] focusing specifically on the vexing problem of how a state court determines that its constitution provides greater protection of individual rights than are afforded under similar or identical federal constitutional provisions. Finally, I hope to demonstrate that the "criteria approach" used by the New Jersey Supreme Court[3] best balances the dual concerns of a state court, which are: (1) to prevent its state constitution from becoming a mere shadow of the Federal Constitution, and (2) to ensure that its state constitution does not unduly expand its citizens' rights so that they bear only a slight resemblance to the protections found under parallel provisions in the Federal Constitution.[4]

I. BACKGROUND OF *MICHIGAN V. LONG*

A. *State Constitutional Law Prior to* Michigan v. Long

The renaissance in state constitutional law, designated the "new judicial federalism,"[5] was first recognized in Justice Brennan's oft-quoted statement:

State constitutions, too, are a font of individual liberties, their protections

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1. 463 U.S. 1032 (1983).

2. *See id.* at 1041.

3. *See* State v. Hunt (Merrel), 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring) [hereinafter M.Hunt].

4. *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1063-64 (1997).

5. *Id.* at 1015.

> often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[6]

Later, Justice Brennan wrote:

> Our states are not mere provinces of an all powerful central government. They are political units with hard-core constitutional status and with plenary governmental responsibility for much that goes on within their borders .... [T]he composite work of the courts of the fifty states probably has greater significance in measuring how well America attains the ideal of equal justice for all .... We should remind ourselves that it is these state court decisions which finally determine the overwhelming aggregate of all legal controversies in this nation.[7]

The emphasis on state constitutions is a return to the earliest days of our country. Before the adoption of the Federal Constitution, citizens relied on their state constitutions to protect their rights.[8] Indeed, many state constitutions provided the model for the Federal Bill of Rights.[9] In the 1960's, under the Warren Court, the pendulum swung in the other direction and the Federal Constitution replaced state constitutions as the primary source of protection of individual rights.[10] At that time, the Federal Constitution ascended to center stage and state constitutions faded into the background.[11] During 1969 to 1986, the Burger Court, however, retreated from some of the more liberal holdings of the Warren Court, and state courts began to turn to their state constitutions as a means to provide their citizens with greater rights than they were receiving under the Federal Constitution.[12]

B. The Long *Requirements*

"[A]s a historical matter, state constitutions exist and function independently of the federal Constitution."[13] All states have their own constitutions. Many of those constitutions are long, detailed documents containing a number of provisions that are

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6. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

7. William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227, 236 (1966) (explaining different roles in constitutional interpretative theory and practice).

8. *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400-01 (1987).

9. *See id.* at 400.

10. *See* A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONSTI. L. 1, 6 (1988).

11. *See id.*

12. *See id.* at 7.

13. Kaye, *supra* note 8, at 403.

only applicable to that state and for which no similar or identical federal constitutional provisions exist.[14] In interpreting those provisions, it is undisputed that state law governs.[15]

Several provisions exist, however, in state constitutions that are comparable or analogous to provisions contained in the Federal Constitution.[16] Traditionally, in those cases, the Supreme Court has declined to review "judgments of state courts that rest on adequate and independent state grounds."[17] Yet, the Supreme Court has acknowledged that "cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question," present vexing problems to the Court.[18] Whether a state court decision plainly sets forth an "adequate and independent" state ground has often been difficult to determine.[19] That issue "typically arises where a state court opinion discusses both state and federal constitutional grounds for a decision without making clear whether the court meant to expand the state guarantee beyond what it believed to be the federal standard."[20]

Before *Michigan v. Long*,[21] "it was safe to assume that any lack of clarity as to the basis of a state court judgment would be resolved in favor of the state court as the final arbiter, and against further review."[22] If the state court opinion cited both grounds, the United States Supreme Court would apply one of the following three approaches: (1) "if the ground of decision was at all unclear . . . dismiss the case," (2) remand the case to the state court to "obtain clarification about the nature of a state court decision," or (3) examine state law to determine whether the state court had applied federal law "to guide its application of state law or to provide the actual basis for [its] decision."[23] Finding all of those approaches unsatisfactory, in 1983, the Supreme Court in *Long* replaced those approaches with a presumption in favor of Supreme Court review.[24] That presumption arises where (1) "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and (2) "the adequacy and independence of any possible state law ground is not clear from the face of the opinion."[25] In such cases, the Court will assume "that the state court decided the case the way it did because it believed that federal law required it to do so."[26] However, the *Long* Court declared that if the state court indicates "clearly and expressly" by "a plain statement in its judgment or

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14. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 355 (1984).
15. *See id.*
16. *Compare* N.J. CONST. art. I, § 7 *with* U.S. CONST. amend. IV (both dealing with unreasonable searches and seizures).
17. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).
18. *Id.* at 126.
19. Kaye, *supra* note 8, at 407.
20. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 164 (2d ed. 1988).
21. 463 U.S. 1032 (1983).
22. Kaye, *supra* note 8, at 407.
23. *See Long*, 463 U.S. at 1038-39.
24. *See id.* at 1040-41.
25. *See id.*
26. *Id.* at 1041.

opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result . . . reached," then federal review of the case is not permitted.[27] The Supreme Court believed that requiring state courts to make a plain statement would "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet [would] preserve the integrity of federal law."[28]

Critics were divided on whether the Court in *Long* was attempting to prevent state courts from exceeding federal courts in the protection of fundamental rights or merely holding "state courts directly accountable for their decisions, thereby preventing them from hiding beneath the robes of the Supreme Court."[29] Probably the best summation of *Michigan v. Long* is Professor Tribe's statement that *Long* "advances interests which lie at the root of our federal system" and "also protects the autonomy of *state* law."[30] Regardless of the reasons for the Supreme Court's decision in *Long*, Associate Justice Pollock of the New Jersey Supreme Court noted that it "created an opening for state courts to strengthen their position in the federalist system."[31] Requiring state courts to set forth plainly the "adequate and independent" state grounds that form the basis of their decisions forces those courts to look beyond the federal law and rely on their own state jurisprudence.

II. THE REHNQUIST COURT'S ADHERENCE TO *LONG*

During the Rehnquist term, there have been numerous Supreme Court cases in which the Supreme Court has affirmed its adherence to the *Long* doctrine.[32] Some of those cases simply relied on boilerplate paragraphs from *Long*. For example, in *Illinois v. Rodriguez*,[33] the Court stated:

> When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision. Michigan v. Long, 463 U.S. 1032, 1041 (1983). But when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," we require that it contain a "'plain statement' that [it] rests upon adequate and independent state grounds," *id.*, at 1040, 1042; otherwise, "we will accept as

27. *Id.*

28. *Id.*

29. Stewart G. Pollock, *The Court and State Contstitutional Law*, Remarks on the Burger Court at the University of Tulsa (Oct. 3, 1996), *in* THE BURGER COURT: COUNTER REVOLUTION OR CONFIRMATION?, 244, 245 (Bernard Schwartz ed., 1998). *See, e.g.*, Ken Gormley, *Ten Adventures in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 29, 37 (1988) (suggesting that the United States Supreme Court's decision in *Long* was an attempt to expand Supreme Court review "over potentially unpalatable state constitutional decisions"); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 30 (1994).

30. TRIBE, *supra* note 20, at 165.

31. Pollock, *supra* note 29, at 245-46.

32. For a complete list of cases in which the Supreme Court has repeatedly followed *Michigan v. Long*, see Arizona v. Evans, 514 U.S. 1, 7-8 n.2 (1995); CHARLES A. WRIGHT ET AL., 16B FEDERAL PRACTICE AND PROCEDURE § 4032, at 444 n.14 (2d ed. 1996).

33. 497 U.S. 177 (1990).

> the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1041. Here, the Appellate Court's opinion contains no "plain statement" that its decision rests on state law. The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution. We conclude that the Appellate Court of Illinois rested its decision on federal law.[34]

In *Pennsylvania v. Muniz*,[35] the Court held that the Pennsylvania Supreme Court's decision did not "rest on an independent and adequate state ground," because the state court had interpreted the challenged Pennsylvania Constitution's provision as offering a protection identical to that provided in the Federal Constitution.[36] Similarly, in *Maryland v. Garrison*,[37] the Court held that, because Maryland's Court of Appeals relied not only on Article 26 of the Maryland Declaration of Rights, but also relied on the Fourth Amendment of the Federal Constitution and federal cases, the Supreme Court had jurisdiction.[38]

In three recent cases, the Rehnquist Court again reaffirmed its adherence to the *Long* doctrine.[39] In *Arizona v. Evans*,[40] an opinion written by Chief Justice Rehnquist, the police stopped the defendant for a traffic violation and a subsequent check with the patrol car's computer revealed an outstanding arrest warrant.[41] While placing the defendant under arrest, the police officer noticed a marijuana cigarette in respondent's hand and found a small bag of marijuana in the car.[42] When the police later discovered that the warrant for respondent's arrest had been quashed, respondent moved to suppress the marijuana as the fruit of an unlawful arrest.[43]

In *Evans*, the Court found that the Arizona Supreme Court's decision to suppress the evidence "was based squarely upon its interpretation of federal law. Nor did it offer a plain statement that its references to federal law were 'being used only for the purpose of guidance, and d[id] not themselves compel the result that [it] reached.'"[44] Therefore, applying federal constitutional law, the Supreme Court determined that the exclusionary rule did not require suppression of evidence seized during an unlawful arrest resulting from a clerical error of either a court employee or a sheriff's office employee.[45]

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34. *Id.* at 182.
35. 496 U.S. 582 (1990).
36. *See id.* at 588 n.4 (1990).
37. 480 U.S. 79 (1987).
38. *See id.* at 83-84 (1987).
39. *See, e.g.*, Arizona v. Evans, 514 U.S. 1 (1995); Pennsylvania v. Labron, 518 U.S. 938 (1996); Ohio v. Robinette, 519 U.S. 33 (1996).
40. 514 U.S. 1 (1995).
41. *See id.* at 4.
42. *See id.*
43. *See id.*
44. *Id.* at 10 (quoting *Long*, 463 U.S. at 1041) (citation omitted).
45. *See id.* at 16.

In reaching its decision in *Evans*, the Supreme Court emphasized its commitment to *Long*, stating that "[w]e believe that *Michigan v. Long* properly serves its purpose and should not be disturbed."[46] Under that decision, the Court noted, "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[47] The Rehnquist Court further reiterated its belief that the "the plain statement" rule will ensure "that state courts will not be the final arbiters of important issues under the federal constitution; and that [the United States Supreme Court] will not encroach on the constitutional jurisdiction of the states."[48]

Similarly, in *Pennsylvania v. Labron*,[49] a 1996 case, the Court held that the Pennsylvania Supreme Court's opinion did not rest on an adequate and independent state ground, but was "interwoven with the federal law."[50] The Supreme Court reached that conclusion because in some of the Pennsylvania state court cases, the Pennsylvania Supreme Court relied on an analysis of federal cases.[51] In his dissent, joined by Justice Ginsburg, however, Justice Stevens opined that the Court's decision "not only extend[ed] *Michigan v. Long* beyond its original scope, but stands its rationale on its head... [E]very indication is that the rule adopted [by Pennsylvania] ... rests primarily on state law. Nor are these holdings 'interwoven' with federal law."[52] Justice Stevens went onto explain that, "[b]ecause the state-law ground supporting these judgments is so much clearer than has been true on most prior occasions, these decisions exacerbate [the unfortunate] effects [of the *Long* decision] to a nearly intolerable degree."[53]

In another 1996 opinion written by Chief Justice Rehnquist, over the dissent of Justice Stevens and the concurrence of Justice Ginsburg, the Court in *Ohio v. Robinette*[54] once more affirmed its commitment to *Long*.[55] The Supreme Court framed the issue in that case to be whether "[t]he Fourth Amendment ... require[s] that a lawfully seized defendant be advised that he is 'free to go' before his consent to search will be recognized as voluntary."[56] The Court held that it did not.[57]

The Court in *Robinette* found that the state court's opinion "clearly relie[d] on federal law ... Indeed, the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution."[58] The Court found that "when the [Ohio] syllabus, as here, speaks only in general terms of 'the federal and Ohio Constitutions,' it is permissible for us to turn to the body of the

46. Arizona v. Evans, 514 U.S. 1, 8 (1995).
47. *Id.*
48. *Id.* at 9 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).
49. 518 U.S. 938 (1996).
50. *See id.* at 941 (quoting *Long*, 463 U.S. at 1040-41).
51. *See id.*
52. *Id.* at 947 (Stevens, J., dissenting).
53. *Id.* at 950 (Stevens, J., dissenting) (citation ommitted).
54. 519 U.S. 33 (1996).
55. *See id.* at 33.
56. *Id.* at 33-34.
57. *See id.*
58. *Id.* at 37.

opinion to discern the grounds for decision."[59] The Court again refused to depart from *Michigan v. Long* and reaffirmed the *Long* presumption.[60]

The Court's finding that many cases, as evidenced by the above, were based primarily on federal grounds seems to conflict with Chief Justice Rehnquist's previous statement at his confirmation hearing that:

> I do not think the [United States Supreme] Court is necessarily the final arbiter of the law of the land. It is the final arbiter of the U.S. Constitution and of the meaning of Federal statutes and treaties. But we still live in a somewhat pluralistic society where the States' highest courts are the final arbiters of the meaning of their State constitutions.[61]

The Court's application of *Long*, however, has led it to hold that a substantial number of state cases do not support the conclusion that they were decided on independent and adequate state grounds.[62] Indeed, in the five years before *Long*, "the Supreme Court reviewed 50% of the cases raising state grounds arguments."[63] In the five years after *Long*, "the Court reviewed 86.7% of the cases arguing independent nonfederal grounds."[64] These percentages suggest that the "justifications offered by the Court for preserving the adequate and independent state grounds doctrine," namely the "[r]eluctance to render advisory opinions and respect for state court decisions . . . are not being realized under the post-*Long* era."[65]

III. RESPONSE OF COURTS TO THE *LONG* REQUIREMENTS

Nevertheless, because of the *Long* decision, state courts have had to determine whether their state constitutions offer greater protection of individual rights than those offered under similar or identical provisions of the Federal Constitution. One commentator noted, "[i]n the past several decades, during which judicial federalism came of age, state courts adopted a variety of methodologies in approaching litigants' arguments that they should be accorded more rights under the state constitution than were currently (or were likely to be) recognized under the Federal Constitution."[66]

Some state courts have followed well-established federal precedent when interpreting a similar or identical state constitutional issue; indeed, some courts have followed in "lockstep," with the Supreme Court's interpretation of the Federal

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59. *Id.*

60. *See Robinette*, 519 U.S. at 33-35.

61. Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1, 2 (quoting *Nomination of Justice William Hubbs Rehnquist: Hearings Before the Committee on the Judiciary United States Senate*, 99th Cong., 2d Sess. 141 (1986)).

62. *See* WRIGHT, *supra* note 32, § 4032, at 444.

63. W. Craig Williams, *Constitutional Law: Premature Federal Adjudication Through the Plain Statement Rule*, 8 U. FLA. J.L. & PUB. POL'Y 129, 138 n.64 (1996).

64. *See id.*

65. *See id.* at 135.

66. Williams, *supra* note 4, at 1018; *see also* James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 259 (1996).

Constitution.[67] Others have given federal constitutional law some deference, but have used state constitutional law "as a supplementary or interstitial source of rights," justifying their departure from federal holdings.[68] Still others have adopted "the primacy approach," in which courts conduct a completely independent analysis of their state constitutions without giving United States Supreme Court decisions any more weight than is given to other state court decisions.[69] In light of these various practices employed by the courts, "[s]cholars continue to catalog the different sequential approaches to state and federal constitutional analysis . . . ."[70]

As Justice Souter observed while serving on the Supreme Court of New Hampshire, in the field of state constitutional law, state courts are often faced with difficult choices.[71] Justice Souter stated: "If we place too much reliance on federal precedent we will render the State rules *a mere row of shadows*; if we place too little, we will render State practice *incoherent*."[72]

Although New Jersey, the home of Justice Brennan, has always been a strong advocate of the new judicial federalism, the New Jersey Supreme Court has chosen the "criteria" approach, under which we apply certain criteria to both the federal and state constitutions to determine whether we will rely on federal constitutional law rather than state constitutional law.[73] There appears to be a growing trend among state courts to adopt the "criteria approach."[74]

In *State v. Hunt*, Justice Handler, a member of my court, in a concurring opinion, set forth the judicial principles that a New Jersey court should consider in determining whether our state constitution affords its citizens greater protections than found under parallel provisions in the Federal Constitution.[75] In *Hunt*, Justice Handler acknowledged that it is essential that a "considerable measure of cooperation must exist in a truly effective federalist system. Both federal and state courts share the goal of working for the good of the people to ensure order and freedom under what is publicly perceived as a single system of law."[76] Justice Handler recognized the danger of erosion or dilution of constitutional doctrine if "state courts [turn] uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere."[77]

Justice Handler then identified seven standards or criteria that our state courts should consider in determining whether to invoke the New Jersey Constitution.[78] First, a state court must examine the textual language of the two constitutional

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67. *See* Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism"*, 2 EMERGING ISSUES IN ST. CONST. L. 233, 233-34 (1989).
68. *See* Williams, *supra* note 4, at 1019.
69. *See id.*; *see also* Williams, *supra* note 14, at 366.
70. Williams, *supra* note 4, at 1018.
71. *See id.* at 1063.
72. *Id.* (quoting State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially)).
73. *See id.* at 1021-22; *see also, M.Hunt*, 450 A.2d 952 (N.J. 1982) (Handler, J., concurring).
74. *See* Williams, *supra* note 4, at 1025.
75. *See M.Hunt*, 450 A.2d at 965-67.
76. *Id.* at 964.
77. *Id.* at 963, 965-67.
78. *Id.* at 965-67.

provisions.[79] That examination is relevant for two reasons: (1) distinctive provisions of the state constitution may recognize rights not identified in the United States Constitution, and (2) "the phrasing of a particular provision in our [constitution] may be so significantly different from the language used" in the Federal Constitution as to suggest an independent interpretation under the state constitution.[80] Secondly, the court should examine the legislative history of the state constitution to determine whether its drafters had a different intention in formulating the state constitution than the founding fathers had in drafting the Federal Constitution.[81]

Thirdly, the court should examine pre-existing state law, which may "suggest distinctive state constitutional rights."[82] Under the fourth criteria, a court should examine the structural differences between the federal and state constitutions to see if they "also provide a basis for rejecting the constraints of federal doctrine at the state level."[83] For example, the Federal Constitution grants enumerated powers while our state constitution "serves only to limit the sovereign power [that] inheres directly [to] the people."[84] Therefore, "the explicit affirmation of fundamental rights in [the New Jersey] Constitution can be seen as a guarantee of those rights and not as a restriction upon them."[85] The fifth criteria requires the court to determine whether the contested issue concerns a matter of particular state interest or local concern.[86] Closely aligned to the fifth criteria is the sixth: whether the "state's history and traditions" call for an "independent application of [the state] constitution."[87] Finally, the court should examine the public attitude of the state's citizenry to ascertain if general opinion may provide grounds to broaden state constitutional rights.[88]

The criteria are illustrative and not exhaustive; "[t]hey share a common thread —that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights."[89] The New Jersey Supreme Court adopted the *Hunt* criteria in *State v. Williams*.[90] Although *Hunt* and *Williams* were decided before *Long*, we continue to adhere to those principles.

Some commentators,[91] and indeed, Justice Pashman, in a separate concurrence in *Hunt*,[92] believe that the "criteria approach" establishes a presumption in favor of the Federal Constitution. By using that approach:

> a state court is compelled to focus on the Supreme Court's decision, and to

79. *See id.* at 965.
80. *Id.*
81. *See M.Hunt*, 450 A.2d at 965.
82. *Id.*
83. *Id.* at 965-66.
84. *Id.* at 966.
85. *Id.*
86. *See id.*
87. *M.Hunt*, 450 A.2d at 966.
88. *See id.*
89. *Id.* at 967.
90. 459 A.2d 641, 650 (N.J. 1983).
91. *See* Williams, *supra* note 14, at 386-89.
92. *See M.Hunt*, 450 A.2d at 960 & n.1 (Pashman, J., concurring).

> explain, in terms of the identified criteria, why it is not following the Supreme Court precedent. It is a *relational*, or *comparative* approach, which analyzes the relationship between, or comparison of, federal and state constitutional law. The stated criteria form a checklist of hurdles or prerequisites for the applicability of a state's highest law. A truly independent state constitutional interpretation 'that will stand the test of detached criticism' is, under this approach, not enough.[93]

Interestingly, Justice Handler, the author of the *Hunt* criteria, criticized the New Jersey Supreme Court in a capital-murder case for attempting "to clone the federal constitution to determine and define critical capital-murder issues and rights."[94] He asserted that "the random selection of constitutional protections, sometimes federal, sometimes state," has resulted in inconsistent approaches in capital-murder cases.[95] Another member of my court, Justice Pollock, in *State v. Lund*,[96] also chided the court for relying solely on federal constitutional law and failing to address state constitutional issues.[97]

As expected from such generalized criteria, even if my court agreed that the criteria were to be considered, the New Jersey Supreme Court rarely has been unanimous about whether such guidelines have established an adequate and independent basis on which to ground a judgment. An examination of *State v. Hempele*[98] best illustrates the court's dilemma in determining whether the criteria approach should be used, and if used, how it should be applied.

Despite the United States Supreme Court opinion in *California v. Greenwood*,[99] in which the Court refused to extend Fourth Amendment protection to curbside garbage left out for collection, both New Jersey[100] and Washington State,[101] which also favors the criteria approach, have provided constitutional protection to an individual's garbage. In *Hempele*, a majority of the New Jersey Supreme Court reasoned that the United States Supreme Court may be reluctant to impose Fourth Amendment protection that would bind every state.[102] That consideration, combined with New Jersey's efficient search warrant process, led the majority to extend state constitutional protection to an individual's curbside garbage.[103]

The decision, however, was not unanimous. Justice O'Hern, in his dissenting opinion, eloquently described his reluctance to interpret the provisions of the New

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93. Williams, *supra* note 4, at 1023 (quoting A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934 (1976)).

94. State v. Hunt (James), 558 A.2d 1259, 1292 (N.J.) (Handler, J., dissenting), *reconsideration denied by* 564 A.2d 873 (N.J. 1989) [hereinafter J.Hunt].

95. *Id.*

96. 573 A.2d 1376 (N.J. 1990) (Pollock, J., concurring).

97. *See generally Lund*, 573 A.2d at 1385-87 (N.J. 1990) (Pollock, J., concurring).

98. 576 A.2d 793 (N.J. 1990).

99. 486 U.S. 35 (1988).

100. *See Hempele*, 576 A.2d at 813.

101. *See* State v. Boland, 800 P.2d 1112, 1115-18 (Wash. 1990).

102. *See Hempele*, 576 A.2d at 800-01.

103. *See id.* at 814.

Jersey Constitution as more protective than identically-worded federal constitutional provisions. He listed two reasons: (1) a deep respect for the Federal Constitution and the Supreme Court of the United States, and (2) "a pragmatic concern that the reservoirs of the [New Jersey Constitution] may be drained by over-consumption."[104]

Justice O'Hern wrote:

> For me, it is not enough to say that because we disagree with a majority opinion of the Supreme Court, we should invoke our State Constitution to achieve a contrary result. It sounds plausible, but one of the unanticipated consequences of that supposedly benign doctrine of state-constitutional rights is an inevitable shadowing of the moral authority of the United States Supreme Court. Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties.[105]

Justice O'Hern believed that relying on state constitutional doctrine when an issue touches on the national identity may undermine respect for the Supreme Court. He observed that, with regard to garbage, a citizen in Trenton ought not to have greater rights than a citizen across the Delaware River in Morrisville, Pennsylvania.[106] At a more pragmatic level, Justice O'Hern also "expressed concern about the expansion of rights based solely on state constitutional grounds because of the ease with which state constitutions may be amended."[107] Indeed, one of the major differences between state constitutions and the Federal Constitution is the facility with which state constitutions can be and are amended.[108]

I also dissented in *Hempele*.[109] I disagreed with the majority's claim that, because of certain factors unique to New Jersey, federal constitutional law should not apply. Applying the *Hunt* criteria, I concluded that there were no independent state-constitutional grounds to justify our divergence from federal law in this area. As I explained:

> The textual language, phrasing, and structures of the Fourth Amendment and article I, paragraph 7 are virtually identical. There is no state statute on this issue and hence no legislative history that would support interpreting the provision independently of federal law . . . . Nor do I find that discarded garbage is a matter of particular state interest that affords an appropriate basis for resolving this issue on independent state grounds. New Jersey garbage is not unique, nor is there any reason to suppose that New Jersey citizens have a greater expectation of privacy in their trash than do citizens

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104. Daniel J. O'Hern, Remarks at the Occasion of the Harvard Law School Conference on the Honorable William J. Brennan, Jr., at 10 (Mar. 14, 1998).

105. *Hempele*, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part).

106. *See id.* at 816 (O'Hern, J., concurring in part and dissenting in part); *cf.* Right to Choose v. Byrne, 450 A.2d 925, 950-51 (N.J. 1982) (O'Hern, J., dissenting) (regarding public funding of abortions, citizen of New Jersey should not enjoy greater equal protection rights than other citizens of this nation).

107. O'Hern, *supra* note 104, at 10.

108. *See, e.g.*, Kaye, *supra* note 8, at 408-09.

109. Hempele, 576 A.2d at 816 (Garibaldi, J., dissenting).

of most other states.[110]

I found that no public policy justified such a departure from federal law, and I believed that "federal law better comports with the reasonable expectation of privacy that most New Jersey citizens have for their discarded garbage placed on the street for collection."[111] I found it impossible to discern a unique New Jersey state attitude about garbage.

In my dissent, I also expressed concern that the majority's opinion would perplex the public. I observed that:

> A citizen becomes confused when he or she finds that under virtually identical constitutional provisions, it is permissible for a federal agent, but not a New Jersey law-enforcement officer, to search his or her garbage. Such distinctions between federal and state constitutions are difficult for a citizen to fathom. In my view, garbage does not change its constitutional dimensions based on who searches the garbage in a particular location. Different treatment of such an ordinary commodity appears illogical to the public and hence breeds a fundamental distrust of the legal system that develops such distinctions.[112]

I recognize that, in some areas, state traditions may sustain a broader interpretative context. For example, the free-speech provisions of the New Jersey Constitution have long been interpreted as having a more expansive sweep than the comparable provisions of the United States Constitution.[113] We have also, in certain instances, found that Article 1, paragraph 7, of the New Jersey Constitution affords greater protection against unreasonable seaches and seizures than does the Fourth Amendment of the Federal Constitution. For instance, we have held that a vehicular search incident to an arrest for a traffic offense is unreasonable under the New Jersey Constitution.[114] We have also refused to adopt the good-faith exception under our state constitution.[115] We have held that the New Jersey Constitution protects privacy interests in telephone toll billing records,[116] and that our state constitution has more liberal criteria for standing to challenge the validity of a search than those under the Federal Constitution.[117] We have even imposed a heavier burden on the State in showing the validity of a non-custodial consent to search under our state constitution than that required under the Federal Constitution.[118]

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110. *Id.* at 817-18 (Garibaldi, J., dissenting).
111. *Id.* at 816-17 (Garibaldi, J., dissenting).
112. *Id.* at 817 (Garibaldi, J., dissenting).
113. *See, e.g.*, New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 770-71 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995); State v. Schmid, 423 A.2d 615, 626-28 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982).
114. *See* State v. Pierce, 642 A.2d 947, 960 (N.J. 1994).
115. *See* State v. Novembrino, 519 A.2d 820, 856-57 (N.J. 1987).
116. *See* State v. M.Hunt, 450 A.2d 952, 956-57 (N.J. 1982).
117. *See* State v. Alston, 440 A.2d 1311, 1318-19 (N.J. 1981).
118. *See* State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975).

Despite those rulings, however, we recently held that two warrantless, suspicionless searches were lawful under both the federal and state constitutions.[119] In each case, we declined to fashion our own analytical state constitutional framework, but instead relied on the Supreme Court's analysis for considering the protections afforded by the Fourth Amendment. In *New Jersey Transit*, we applied the Fourth Amendment special-needs balancing test to determine the lawfulness of suspicionless searches of public employees and held that random drug testing of transit police officers was not unreasonable under the New Jersey Constitution.[120] In *Ex Rel J.G.*, we again relied on the special-needs analysis and held that the statutes providing for the testing of charged or convicted sex offenders for acquired immune deficiency syndrome (AIDS) or infection with human immunodeficiency virus (HIV) did not violate the Fourth Amendment or our state constitution.[121]

IV. NEW JERSEY'S NEW JUDICIAL FEDERALISM

Based on those recent decisions, some commentators have suggested that the New Jersey Supreme Court's commitment to new judicial federalism is waning.[122] I do not think so.

Today, there is much disagreement among the experts about the status of state constitutional law. Some have concluded that the new judicial federalism has failed because of its lack of doctrinal consistency in state court opinions.[123] Another scholar champions state constitutionalism as "a process of giving voice to the state court's understanding of the values and principles of the national community."[124] At least one commentator argues that the new judicial federalism has led to a "tidal wave of state court opinions that diverge from the standards established under the federal Constitution."[125] Nevertheless, he recognizes that the new federalism is alive and well and will continue.[126]

For various reasons, the new judicial federalism still meets with resistance.[127] As observed by Justice Pollock, that conclusion is supported by the findings of Professor Esler, who estimates that state supreme courts based their decisions primarily on state grounds in only twenty-two percent (22%) of their cases.[128]

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119. *See* New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 701 A.2d 1243 (N.J. 1997) [hereinafter *New Jersey Transit*]; New Jersey *ex rel* J.G., 701 A.2d 1260 (N.J. 1997).

120. *See New Jersey Transit*, 701 A.2d at 1255-60.

121. *See New Jersey ex rel J.G.*, 701 A.2d at 1266-75.

122. *See, e.g.*, Anna Snider & Cheryl Winokur, *In First Cases, Poritz Shows No Liberal Bent*, N.J.L.J., Sept. 29, 1997, at 1.

123. *See, e.g.*, Pollock, *supra* note 29, at 254; Diehm, *supra* note 66, at 238. *See also*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH L. REV. 761 (1992) (contending that state constitutional law has failed to produce coherent body of law).

124. Paul W. Kahn, *Interpretation and Authority in State Constitutions*, 106 HARV. L. REV. 1147, 1168 (1993).

125. Diehm, *supra* note 66, at 238.

126. *See id.* at 260.

127. *See* Joseph R. Grodin, *The New Judicial Federalism: A New Generation Symposium Issue*, 30 VAL. U.L. REV. 601, 608 (1996); Diehm, *supra* note 66, at 260.

128. *See* Pollock, *supra* note 29, at 252 (citing Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 28-29 (1994)).

Additionally, in ninety-eight percent (98%) of the decisions based on state law, the state supreme courts deferred to precedents of the United States Supreme Court.[129] According to Professor Esler, only eight states consistently utilize state law, basing at least half of their decisions on state law grounds: Alaska, Arkansas, Florida, New Jersey, New York, South Dakota, Tennessee and Texas.[130]

Several reasons have been cited to explain why interest in state constitutional jurisprudence appears to have diminished. The Rehnquist Court's emphasis on federalism has shifted the focus of legal scholars from the "new judicial federalism" that started in the late 1970's and flourished in the 1980's to the traditional garden-variety federalism. Moreover, many state judges and attorneys, trained primarily to consider the Federal Constitution as the fundamental protector of individual rights, are reluctant to rely on state constitutional law. Federal law and jurisprudence is much more developed than state law. Indeed, many state constitutions do not have much history, and records of the constitutional conventions may be difficult to find or are non-existent.[131] Senior Justice Ellen Peters of the Connecticut Supreme Court has suggested that the lack of history and state law jurisprudence also results from the fact that, even though most legal business is done in state courts (approximately 95%), and state courts determine the totality of rights of most litigants, most law reviews and law professors still discuss only federal law.[132]

Furthermore, because it is perceived that the new judicial federalism arose primarily from an attempt to give criminal defendants greater rights under state constitutions than they were receiving under the Federal Constitution, a backlash developed among the legislators and voters. That backlash, presented a practical problem for some judges, particularly those who had to run for election or retention.[133] To avoid negative repercussions, some state judges may have preferred to place blame for an unpopular decision on the United States Supreme Court. For instance, in 1982, the voters of both California and Florida amended their respective state constitutions to assure that the state judiciaries did not exclude evidence that was admissible under federal law.[134] On June 8, 1982, the California electorate adopted Proposition 8, which amended Article I, section 28(d) of the California Constitution to read, "relevant evidence shall not be excluded in any criminal proceeding."[135] In Florida, voters adopted a constitutional amendment requiring the Florida courts to construe state law "in conformity with the Fourth Amendment to the

129. *See id.*

130. *See id.* at n.95.

131. *See id.* at 253 (discussing Esler, *supra* note 128, at 28-31).

132. Honorable Ellen Peters, Senior Justice of the Connecticut Supreme Court, Remarks at the Fourth New York University Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Feb. 11, 1998).

133. *See* Pollock, *supra* note 29, at 252.

134. *See* CAL. CONST. art. I, §28(d) (amended 1982); FLA. CONST. art. I, §12 (amended 1982).

135. CAL. CONST. art I, § 28(d) (amended 1982). For a review of some of the reasons the voters adopted Proposition 8 and for a review of the California courts' subsequent treatment of the amendment, see Grover C. Trask, II & Timothy J. Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim Rights*, 23 PAC. L.J. 1101 (1992).

United States Constitution, as interpreted by the United States Supreme Court."[136]

In New Jersey, the Legislature and voters also have expressed their disapproval of some of the state supreme court's decisions that expanded protection for criminal defendants. For example, the New Jersey Supreme Court held that the New Jersey Constitution prohibited the imposition of a death sentence when a defendant had been convicted of causing only serious bodily injury resulting in death, as opposed to purposely or knowingly causing death.[137] Several years later, the voters approved a constitutional amendment explicitly permitting imposition of the death penalty "on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death."[138] Similarly, the New Jersey Legislature enacted a statute limiting the state supreme court's proportionality review in death penalty cases "to a comparison of similar cases in which a sentence of death has been imposed" rather than to all cases in which the death penalty could have been imposed.[139]

As Justice Pollock, a member of our court, has written:

> Even if the [Supreme Court] is perceived as infallible only because it is final, the perception of infallibility, or something close to it, survives. As a practical matter, a state court that reaches a decision on a state ground contrary to a decision of the United States Supreme Court on a parallel federal ground must justify its decision to the legal community and to the public. In an era of constant public concern about crime, a state court's justification for granting enhanced protection to the rights of criminal defendants better be persuasive.[140]

One of the strongest arguments against the new judicial federalism is that "[a] national culture and a national media support a national political life. In all of these ways—from defense to art—modernity works against federalism."[141] As noted by Paul Kahn:

> Although some states may have been founded to secure a place for difference from existing political communities, most states were founded not in order to be different, but to realize for their own communities the ideals that are the common heritage of the nation. Whatever the differences in historical origins, those differences are less and less relevant to today's communities.[142]

However, some commentators reason that, rather than fragmenting, "[t]his

136. FLA. CONST. art. I, § 12 (amended 1982). For an excellent historical analysis of Florida constitutional law, see David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990).

137. *See* State v. Gerald, 549 A.2d 792, 807 (N.J. 1988).

138. *See* N.J. CONST. art. I, ¶ 12 (amended 1992).

139. N.J. STAT. ANN. § 2C:11-3(e) (West Supp. 1998).

140. Pollock, *supra* note 29, at 251-52.

141. Kahn, *supra* note 124, at 1150.

142. *Id.* at 1166.

[new] federalism can make of us a better national community."[143] They believe that by freeing "state courts to place themselves in the tradition of American constitutionalism . . . then the meaning of American citizenship is enriched . . . . It is especially enriched because fifty different courts will talk with each other, as well as with the federal courts[.]"[144] Ultimately, how you view the new judicial federalism will depend on your views of the "federalist system, the role of state courts in a constitutional democracy, and the relative roles of law and order and fundamental rights at the close of the twentieth century."[145]

V. CONCLUSION

It is clear today that the assertion that a state constitution provides greater protection than the Federal Constitution is no longer novel. In my Court, when we base our decision on the New Jersey Constitution, we state clearly the "adequate and independent" state grounds that form the basis for that opinion. Nonetheless, there will continue to be cases where state courts will be faced with having to determine whether its constitution provides greater protection of individual rights than afforded under the Federal Constitution. In making that determination, state courts will still be presented with the vexing problem of how to prevent state constitutions from becoming "a mere row of shadows" of the Federal Constitution and from gleaning such little guidance from federal law as to make state law "incoherent."[146]

I believe that New Jersey's "criteria approach" best solves that problem. By providing criteria that must be considered in every case, the New Jersey Supreme Court has furnished consistency, at least in method, if not in analysis. I am concerned about the extent to which fifty independent state court systems can substitute for the federal courts in the protection of fundamental rights[147] and for the "common ideal of American constitutionalism."[148] I agree with Justice O'Hern that "[t]he great moral disasters of the twentieth century . . . all occurred in societies in which there was no genuine rule of law, no appeal of last resort, no guarantee of liberties."[149] I also agree that, "[b]ecause the United States Supreme Court enjoys a profound residue of trust, it occupies the position of the final arbiter, the as yet unassailable guardian of our rights and liberties."[150]

I recognize that "state constitutional law plays a vital role in the federalist system."[151] Nonetheless, to me, the New Jersey criteria approach, which gives slight deference to the United States Constitution, best achieves the appropriate balance for

143. *Id.* at 1168.
144. *Id.*
145. Pollock, *supra* note 29, at 251.
146. Williams, *supra* note 4, at 1063.
147. *See* Diehm, *supra* note 66, at 244-45.
148. Kahn, *supra* note 124, at 1166.
149. State v. Hempele, 576 A.2d 793, 815-16 (N.J. 1990) (O'Hern, J., concurring in part and dissenting in part).
150. O'Hern, *supra* note 104, at 8.
151. Pollock, *supra* note 29, at 255.

determining whether a state constitution provides greater protection of individual rights than a similar federal constitutional provision. Requiring a state court to explain its departure from the interpretation of an identically worded federal constitutional provision focuses the court's attention on reconciling seemingly analogous provisions of state and federal constitutions. Unless the state court can show from an examination of the textual language of the two constitutional provisions, the legislative history of the state constitution, or the state's history and tradition that the matter is of particular state interest or concern, it should not expand federal constitutional rights under an identical state constitutional provision. Those cases where there is a discernible reason to interpret identical federal and state provisions differently will be limited.

Applying the criteria approach will not diminish the importance of state constitutions or state courts. As observed by Chief Judge Judith Kaye of the New York Court of Appeals, "[o]verwhelmingly, our nation's legal disputes are centered in the *state courts*, which handle more than ninety-seven percent of the litigation."[152] Entire "categories of cases affecting the day-to-day circumstances, indeed survival, of our citizens are largely[,] if not exclusively adjudicated in the *state courts*."[153] State courts determine in large part "how well this nation attains its ideal of equal justice."[154] In doing that work, the state courts will rely not only on their state constitutions but on that "golden and sacred rule of reason," the common law.[155] "As the courts both literally and figuratively closest to the people, it is beyond question that *state courts* [will] continue to play a vital role in shaping the lives of our citizenry"[156] and that state constitutional law will continue to play a vital role in the federalist system.

152. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 3 (1995) (emphasis added).
153. *Id.* at 4 (emphasis added).
154. *Id.* at 5.
155. *Id.* (quoting CHARLES F. MULLET, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776, 46 (1966)).
156. *Id.* (emphasis added).